IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5623 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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GUJARAT STEEL AND AGRICO INDUSTRIES

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 5623 of 2002

MR PARESH M DAVE for Petitioner No. 1-2

MR DN PATEL for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2-3

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 30/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Rule. Mr DN Patel learned Sr. Standing Counsel for the Central Government waives service of rule for the respondents.

2. In this petition under Article 226 of the Constitution, the petitioner challenges the order dated 11-10-2001 passed by the Commissioner (Appeals), Central Excise and Customs, Ahmedabad (Annexure F) requiring the petitioner to deposit the amount of differential duty confirmed by the Deputy Commissioner of Central Excise Rural Div.II, Kalol, failing which, the appeal would be liable for dismissal under Section 35F of the Central Excise Act, 1944 and the subsequent order dated 14-5-2002 dismissing the petitioner's appeal for non-compliance of the provisions of Section 35F of the Act as the petitioner did not deposit the amounts as per the aforesaid orders.

3. The controversy arising in this petition lies in a very narrow compass and involves interpretation of the provisions of Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997. The said rules were framed pursuant to the insertion of Section 3A in the Central Excise Act, 1944 levying compounded duty on the basis of the annual capacity of the production of a factory, if such goods are manufactured or produced with the aid of hot re-rolling mill. Rule 3 of the aforesaid rules contained the formula for determining the annual capacity of production. Sub-rule (3) thereof provides as under:-

(3) the annual capacity of production of hot re-rolled products of non-alloy steel in respect of such factory shall be deemed to be as determined by applying the following formula:-

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Annual Capacity= 1.885 X 10 x d x n x i x e x w x Number of utilised hours (in metric tonnes)

Where:

d = Nominal centre distance of the pinions in the pinion stand in millimetres

n = Nominal revolutions per minute (RPM) of the drive

i = Reduction ratio of the gear box or of the pulley system or combination thereof.

w = Weight in Kilogramme per metre of the

re-rolled product.

The value of "e" and "w" is also laid down in the said rule 3. However, for the purpose of the present controversy, it is not necessary to give details thereof nor is it necessary to give the details about the formula for working out the number of utilised hours. Rules 4 and 5 thereof are material and read as under:-

4 (1) The capacity of production for any part of the year, or any change in the total hot re-rolling mill capacity, shall be calculated pro rata on the basis of the annual capacity of production determined in the above manner stated in rule 3.

(2) In case a manufacturer proposes to make any change in installed machinery or any part thereof which tends to change the value of either of the parameters 'd', 'n', 'e', 'i' and 'speed of rolling' referred to in sub-rule (3) of rule 3, such manufacturer shall intimate about the proposed change to the Commissioner of Central Excise in writing, with a copy to Assistant Commissioner of Central Excise, at lest one month in advance of such proposed change, and shall obtain the written approval of the Commissioner before making such change. Thereafter the Commissioner of Central Excise shall determine the date from which the change in the installed capacity shall be deemed to be effective.

5. In case, the annual capacity determined by the formula in sub-rule (3) of rule 3 in respect of a mill, is less than the actual production of the mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the mill during the financial year 1996-97.

4. There is no dispute about the following facts stated in para 4.2 of the petition:-

4.2 The actual production of goods in the petitioners' factory during the year 1996-97 was 2595 MTs. However, the petitioners had applied for changing parameter "d" i.e. nominal centre distance of the pinions in the Pinion stand in millimeter and the Commissioner of Central Excise had allowed the petitioner firm to change the said parameter with effect from 11-1-98. Thus,

for the financial year 1998-99, the petitioners had changed the said parameter and therefore, the APC was required to be determined in accordance with Rule 4 of the above APC Determination Rules. The petitioner firm had filed a declaration alongwith a representation to the Commissioner of Central Excise thereby declaring the relevant factors and parameters which resulted in APC of 971.40 MTs and, therefore, the petitioner firm was obliged to pay excise duty on the above APC of 97.40 MTs.

It was on the basis of the petitioner's application and personal hearing granted by the Commissioner of Central Excise to the petitioner that the Commissioner accepted the change in parameter 'd' w.e.f 11-1-1998 from 190 mm to 158 mm. This was communicated to the petitioner vide Assistant Commissioner's letter dated 22-4-1998 (Annexure B to the petition).

5. However, the petitioner was served with three show cause notices issued by the Superintendent of Central Excise (Annexure C Colly) calling upon the petitioner to pay excise duty on the basis that the annual capacity of the production (APC) for the year 1998-99 was 2595 MT as against the annual capacity of production (APC) as assessed by the petitioner at 971.40 MT. The petitioner contested the said show cause notices but the Deputy Commissioner of Central Excise confirmed the duty as demanded in the show cause notices on the basis of the interpretation placed on the aforesaid rules, by holding that the actual production in the year 1996-97 had to be taken as the minimum APC in any case.

6. The petitioner went in appeal. As far as the petitioner's application for stay is concerned, the Commissioner (Appeals) waived pre-deposit of penalty but required the petitioner to deposit the amount of differential duty as confirmed by the Deputy Commissioner and, therefore, this petition.

7. Mr Paresh Dave, learned counsel for the petitioner has submitted that Rules 3, 4 and 5 of the aforesaid Rules of 1997 have already been interpreted by the larger bench of the CEGAT in Sawan Mal Shibumal Steel Rolling Mills vs. CCE, Chandigarh-I 2001 (42) Revenue Law Times 75. It has been held that Rule 5 would be relevant and applicable in all cases where there is no change in the annual capacity of production or the annual capacity of production is augmented on account of change in the machinery of production. However, it would have

no application when change in machinery leads to reduction in the annual capacity of production, when the same is computed according to the parameters mentioned in Rule 3 of the aforesaid rules.

8. We would set out the following reasoning and conclusion of the larger bench of the CEGAT in Sawan Mal Shibumal Steel Rolling Mills (supra):-

"Re-determiniation is occasioned by changes made in the installed machinery. When changes in machinery cause reduction in the annual capacity of production, fixing the annual capacity of production based on the actual production of a previous year, when the capacity for production of the machinery was higher, would be highly unreasonable and it would amount to comparing the uncomparables. The application of the deeming provision contained in Rule 5 in such a case would be grossly unjust. It would be also impermissible, as such a determination would be without any regard to the annual capacity of production, the basis for the compounded levy. However, the situation is quite different when the modification of the machinery is to augument the annual capacity of production.

9. From a perusal of our previous decisions, we find that all of them related to cases involving reduction of capacity of production on account of change in the machinery. In those circumstances, the Tribunal held that Rule 5 had no application to those cases. Those decisions cannot constitute the basis for the contention that Rule 5 is wholly inapplicable irrespective of whether the change in machinery is for reduction in the capacity, to retain the same capacity or augmenting the capacity of production. When the capacity remains the same or the capacity is increased on account of change of machinery, no unintended hardship is visited upon tax payers by the application of Rule 5. However, when change of machinery leads to reduction of annual capacity, Rule 5 would not apply.

10. In the light of the above discussions, we answer the reference by stating that Rule 5 would be relevant and applicable in all cases where there is no change in the annual capacity of production or the annual capacity of production

is augmented on account of change in the machinery of production. However, it would have no application when change in machinery leads to reduction in the annual capacity of production, when the same is computed according to the parameters mentioned in Rule 3 of the Hot Rolling Steel Mills Annual Capacity Determination Rules, 1997.

9. In para 9 of its judgment, the larger Bench of the CEGAT approved the principle laid down by the CEGAT in Awadh Alloys (P) Ltd. vs. CCE, Meerut, 1999 (33) RCT 1968 and Ballary Steel Rolling Mills vs. CCE, Belgaum 2000 (39) RLT 701 laying down that in case of reduction in the machinery for production, Rule 5 was not to be applied.

10. Following the aforesaid decisions in Awadh Alloys (supra) and Bellary Steel (supra), the Mumbai Bench of the CEGAT had passed orders which came up for consideration of this Court in CECG Application No.41 of 2001 and in another group of applications being CECG Application Nos.6 to 16 of 2002. This Court rejected those applications, inter-alia, observing that on going through the order of the Tribunal, no question of law can be said to be arising from it which required a reference to the High Court for its opinion. Similarly, CECG Application Nos.6 to 16 of 2002 also came to be dismissed by this Court's order dated 11-1-2002.

11. This Court has recently also rejected reference applications arising from orders of CEGAT following the aforesaid larger bench decision.

12. In view of the aforesaid pronouncements of this Court declining to grant the reference applications preferred by the revenue, it is obvious that the principles laid down by the larger bench of the CEGAT presided over by Hon'ble Mr Justice K Sreedharan, President, in Sawan Mal Shibumal Steel Rolling Mills vs. CCE, Changidarh-I 2001 (42) RLT 75 will have to be accepted as correct principles. We are also of the view that the larger bench of the Tribunal has correctly interpreted the provisions of Rules, 3, 4 and 5 in the said decision.

13. Accordingly, when the annual production capacity of the petitioner's factory was 971.40 MT w.e.f 12-1-1998 in view of the reduction in parameter 'd' from 190 to 158 mm as conveyed by the Assistant Commissioner's letter dated 22-4-1998, the respondents could not have taken

into consideration the actual production for the year 1996-97 under Rule 5. The actual production in the petitioner's factory for the year 1996-97 at 2595 MT could have been applied only if there was no change in the machineries in the petitioner's factory in the relevant year under consideration or if the change had augmented the actual production capacity but since the reduction in the machineries had resulted into reduction in the annual production capacity as per the formula contained in Rule 3(3), the authorities were not justified in applying Rule 5 and, therefore, for the relevant year 1998-99, the respondents are required to be directed to apply the formula contained in Rule 3(3) of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997, without applying Rule 5.

14. The petition is accordingly allowed in the aforesaid terms. The impugned orders dated 11-10-2001 and 18-5-2002 at Annexures "F" and "L" respectively are quashed and set aside and the Commissioner (Appeals) shall hear and decide the petitioner's appeal without any pre-deposit.

15. Rule is made absolute with no order as to costs.

(M.S. Shah,J) (K.A. Puj,J)

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